A Critical Assessement of Provisions of the Federal Constitution with regard to Federal-State Relationship on Land Law

By

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Abstract

This paper examines the relationship between Federal-State government on land law under the Federal Constitution. Under this set up, the Constitution delineates and demarcates the sphere within which these two level of government operates. Basically, land and land-based resources are assigned to the state, meaning that each state government can legislate on land matters. But the Constitution, however, in many instances also allows federal intervention in land matters. In other words, in encouraging diversity in its land law and policy, it also promotes uniformity of law and policy by permitting federal intervention in land and land related matters. As a result, there are more than 200 legislations on land law in Malaysia enacted both or either at federal and state level. Thus, conflict, which ranges from conflict between a federal law and state law to the conflict arising from direct challenges by the state of the federal government's land policy, is inevitable under this set-up. Hence, this paper reveals the strain and stresses of intergovernmental relations pertaining to land and land-based resources.. It finds that land law and policy is increasingly characterised by pragmatic federalism emphasizing collaborative partnerships, adaptable management strategies, and problem and process orientation. The evolving nature of federal-state relations, characterised by expanding federal authorities and increased state capacity, with the recent change in the political scenario, calls for improved coordination & collaboration as to impoverised the land law and land administration system of the country.

Keywords

Land Law – Federal Constitution – Division of power under Constitution – Ninth Schedule - Conflict

Introduction

Malaysia is a small country with an area of approximately 330,000 square kilometres - Peninsular Malaysia 131,585 square kilometres, Sarawak 124,450 square kilometres and

Sabah, 73,711 square kilometres - and a population of 23.27 million[1]. Despite this, it has more than 125 land legislation other than the National Land Code. It is a federation of 13 states and three federal territories: that is the former Malay states of Selangor, Perak, Pahang, Negeri Sembilan, Kedah, Perlis, Johor, Kelantan and Trengganu, the former Straits Settlements states of Malacca and Penang, situated in Peninsular Malaysia and the two Borneo states of Sabah and Sarawak forming East Malaysia and the federal territories of Kuala Lumpur, Labuan and Putrajaya. Apart from the three federal territories that are administered by the federal government, the other states are governed by theie respective state government. Peninsular Malaysia, which is about the size of England, consists of eleven states. Formerly referred to as the Federation of Malaya, it attained political independence from Britain on 31st August 1957, and was absorbed into the greater Federation of Malaysia on 16th September 1963. On the formation of Malaysia, Singapore and the British Protectorates of Sarawak and Sabah on the Borneo Island became constituent parts of the new Federation. In 1965, however, Singapore left the Federation of Malaysia, leaving the eleven states of Peninsular or West Malaysia and the two Borneo states forming East Malaysia. Some 400 miles of the South China Sea separate West and East Malaysia.

As to land, historically and constitutionally it has always been under the jurisdiction of state governments[2]. All land situated within the respective state boundaries are vested in the state and they therefore have the power to dispose and deal with it. Both the legislative and executive functions pertaining to land matters are vested in the states and the supreme authority in each state on questions of land administration is the Ruler[3]. Moreover, revenue from land taxation accounts for a major part of the state's annual income.

'Land' under the Federal Constitution

The Constitution seems to adopt an artificial definition of land when it separates land in its physical form from its components or resources such as tin ores, petroleum, forestry and agriculture. Even though the Constitution has separated land from its components, the components are all placed under the same list that is the State List. But, the state government shares its jurisdiction with regard to town and country planning and environmental related matters that are also assigned to the federal government. The definition of land given by section 5 of the National Land Code 1965 is wider in scope

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[1] http/www/statistics.gov.my/English/pressdemo.htm on 27th June 2002. The population and housing census 2000 made by the Population Distribution and Basic Demographic Characteristic Board was carried out from the 5th July 2000 to 20th July 2000.

[2] Article 74(2) Federal Constitution. See also the case of *East Union (Malaya) Sdn. Bhd. v. Government of Johore & Government of Malaysia* (1981) 1 MLJ 151

[3] "Ruler" defined under Article 160 of the Federal Constitution as "in relation to Negeri Sembilan, means the Yang di Pertuan Besar acting on behalf of himself and the Ruling Chiefs in accordance with the Constitution of that State; and in the case of any State, includes…any person who in accordance with the Constitution of that State exercises the functions of the Ruler:"

and in line with the common law definition as compared to that adopted by the Constitution. It refers to land not only in its physical form but include its components. As a result of the artificial demarcation made by the Constitution, the land law in Malaysia does not encompassed matters relating to town and planning, environment, mining, forestry and agriculture. The word "land" in the paper encompass not only land in its physical form but will also include its components such as environment, mining, and town planning.

The federal Parliament in many circumstances has the power to legislate beyond the confines of the specific legislative list. This overriding legislative power has enabled Parliament to make laws with respect to land matters for the purpose of ensuring uniformity of law and policy in all the eleven states in Peninsular Malaysia. But this federal government's power conferred by Article 76 cannot be extended to Sabah and Sarawak. Nevertheless under a federal set-up, which allows federal intervention, the centre can encroach without much difficulty[4].

At present, the federal Parliament's power to make law on the basis of "uniformity of law and policy" does not extend to any land matters but only covers "land tenure, the relationship of landlord and tenant, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land and local government"[5]. However, it is observed that Parliament's power to legislate on the "uniformity basis" exclude Malay reservations, permits and licenses for mining, mining leases and certificates as well as escheat and treasure trove[6] Thus, federal Parliament may, on the ground of uniformity, intervene in land matters and as a result, major land legislation, the National Land Code[7](hereinafter referred to in its abbreviated form as "NLC") was enacted and brought into force on 1st January 1966 for all the states of Peninsular Malaysia. Other legislations enacted under this provision are the Land Acquisition Act 1960[8] and the Land (Group Settlement Areas) Act 1960[9]. The NLC was enacted with the objective of introducing a uniform land system with respect to land tenure, registration of titles and land transactions[10] This legislation replaced forty-three different types of legislation relating to both federal and

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[4] Faruqi, Shad Salim, "The Legal Basis for Federal State Relationships in Malaysia" in Insaf, October 1981 at p.16.

[5] Article 76(4) Federal Constitution. The federal Parliament has additional powers with regard to rating and valuation of land which is not included in item 2 of the state list.

[6] See Item 2 of the State List

[7] Act no. 56 of 1965

[8] Act 486 of 1960. It was formerly enacted as Act No. 34 of 1960.

[9] Act 530 enacted in 1960 as Act 13 of 1960. It was revised in 1993 and published as laws of Malaysia Act 530.

[10] Preamble to the National Land Code 1965

state[11], and has significantly affected the land tenure system, land policies and land development in the country. These changes were initiated with the object of achieving national development objectives as set out under the various Malaysian development plans[12]. Besides the NLC, there are about 125[13] other laws in Peninsular Malaysia relating to land. A number of separate federal and state land laws continue to exist and are not affected by the Code. These laws concern Malay Reservations, Mining Enactments, National Forestry Act 1984, Customary Tenure Enactments, Sultanate lands, laws relating to Wakaf (land bequeathed for religious purposes) or baitul-mal (General Endowment Fund), the Kelantan and Terengganu Land Settlement legislation, the Land (Group Settlement Areas) Act, Land Development Act, Town and Country Planning Act, Environmental Quality Act, the Land Acquisition Act, the Small Estates (Distribution) Act, Padi Cultivators (Control of Rent and Security of Tenure) Act and other related land laws.

Federal intervention in this area does not only occur legislatively but also via federal administrative bodies such as the National Land Council, the office of the Director General of Land[14] and the Regional Development Authority. In addition to directing and controlling the utilisation of land the National Land Council has a duty to advise both the federal and state governments in respect of utilisation of land or any proposed legislation dealing with land or the administration of any such law. But, since the federal government has no executive functions and merely acts in an advisory capacity, it has no authority to enforce its directions. Nevertheless, pursuant to its national development plan and the New Economic Policy, the federal government has increasingly used its strong financial position to intervene in land development projects through the Federal Land Development Authority (FELDA), the Federal Land Consolidation and Rehabilitation Authority (FELCRA) and the various Regional Development Authorities.

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[11]Nik, Mohd. Zain Yusof, Land Tenure and Land Reform in Peninsular Malaysia. Phd. Thesis, University of Kent, at p. 1

[12] Malaysia began an elaborate national development planning system in 1955 with the establishment of the Economic-Secretariat. The Secretariat prepared the Malayan Public Investment Programme, which then became the First Malaya Five-Year Development Plan (FMP: 1956-60). The term 'national development planning' as practiced in Malaysia can be defined as:

"a deliberate, comprehensive, time-specific effort, initiated and sustained by the central government for the purpose of creating and maintaining conditions that will accelerate economic growth and social development in the country". See Sulaiman Abdullah, *The Malaysian Planning and Implementation Process with special reference to rural development,* Economic Planning Unit, August 1968, Malaysia.

[13] For a list of land laws related to land see *Manual for Land Administration,* Federal Lands and Mines Department, Government Printer, Kuala Lumpur, 1980, p. 423-431

[14] However, the Director General of Land has no executive function and he acts in an advisory capacity only. He also has authority to inspect land offices throughout Peninsular Malaysia with the approval of State Director of Land but he has no authority to enforce his directions. He is only able to control or sufficiently influence land policy and administration through the State Director of Land that is by convening a regular meeting of the Director of Land, s. 8(1)(c) of the NLC.

Hence, because of the federal government's centralising tendency and also the drive towards uniformity referred to above, the states have undoubtedly been guarding and retaining this remaining and important function with a considerable degree of caution[15]. This sometime has incontestably brought the federal government into conflict with the state governments over land matters, for instance, it took the National Land Council over 20 years to have a uniform legislation on mining – the State Mining Enactment, to replace the varied state Mining Enactment but has yet to be fully adopted by all the state. It was initially rejected by the state governments which viewed the proposal as an infringement by the federal government over state rights on land matters[16].

The above situation illustrates that the centralising tendency by federal government and the drive towards uniformity has inevitably created conflict between the federal government and the state governments over land matters.

But land conflict does not only occur between federal and state due to federal centralising tendency, but also occur reluctantly on the part of the federal government. For instance, on the controversial issue of excessive logging at the Endau-Rompin National Park which came to the forefront of public notice/domain in the late 70's which centred principally on the issuance of logging licences by the Pahang government to logging companies to carry out the felling of timber in the core area of the Park[17]. Similar to land, forestry is also listed in the state list and hence comes within the state jurisdiction. The federal government, almost an unwilling party to the controversy, admitted that the logging activities were contrary to the then Third Malaysia Plan[18] but conceded that it had no power to stop the state of Pahang from issuing the licences for logging. However, the federal government amidst public outcry over the detrimental environmental impact of the logging activities responded by imposing an export ban on all logs produced from the Endau-Rompin Park.[19]

Thus land conflict occurs not only between federal and state but as illustrated by the above instance, conflict also occur when certain set principles like environmental

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[15] Abdul Rani, Kamaruddin, *Land Administration in West Malaysia A Structural Modification for Development Administration*, University of Pittsburgh, Master of Public Administration dissertation (1970), at p. 5

[16]Yusof, Nik Mohd. Zain, *Land Tenure and Land Reforms in Peninsular Malaysia*, University of Kent, Phd. theses (1989), at p. 57

[17] This area covers a total of 500,000 acres covering parts of Johore and parts of Pahang. It is proposed under the Third Malaysia Plan to be a multi-purpose National Park with logging restricted to designated areas.

[18]According to the Third Malaysia Plan (TMP 1976 - 1980) the Endau-Rompin National Park which was declared, as a forest reserve area due to environmental consideration and hence logging in this area was limited to certain designated areas.

[19]Hussain, Shaikh Mohammad Noor Alam, *Forestry in Malaysia*, University of Malaya, dissertation submitted in partial fulfilment for the degree of Masters of Law (1979), at p. 103

considerations and national development plans are contravened.

As mentioned earlier, land and matters incidental to it, are in terms of the Constitution under the jurisdiction of the state government. However, because of the complex nature of the land tenure system that the federal government inherited on independence from the British colonial masters, the government was required to intervene at federal level to introduce some means of uniformity. However, the federal government encroachment on land matters is not confined to achieving uniformity of land law and policy. Other political and economic considerations have tilted the balance of power further in favour of the federal government at the expense of the state government. Hence conflict is inevitable in such a set-up.

That such conflicts occur is evident from observations made by a number of commentators about the system. Yusof,[20] for example, states that land policies were not contained in the legislation and therefore not enacted but often left open ended at the discretion of individual state governments. As a result conflict occurs. These unwritten policies are usually contrary to the spirit and purpose of "uniformity of law and policy" and "a uniform land system" as advocated in the Federal Constitution[21] and the National Land Code[22] respectively. They have also caused problems at the implementation stage. Leong[23] comments that even though the two systems of land use and development control, i.e. the land and planning legislation, do not duplicate each other they are likely to come into conflict and thus, a conflict resolution procedure is required. Wilcox[24] on the other hand suggests that there is a greater need to rely on the system of conditional title under the National Land Code 1965 to provide for a more effective method of control of the use and development of land. He has questioned the wisdom that the system of conditional title under the National Land Code can operate against the system of planning control under the Town and Country Planning Act 1976 in the event of conflict.

A preliminary assessment of the literature and the writer's own observation; suggest that conflicts may occur in five different areas of the system. These are considered briefly in turn.

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[20] See Yusof, N.M.Z. bin Hj. Nik, *Land Tenure and Land Law Reforms in Peninsular Malaysia*

[21] Article 76(4) of the Federal Constitution

[22] Paragraph 4 of the preamble to the NLC

[23] Leong, Hoon Wah, "Ideology and Conflict in the Systems of Control of Use and Development of Land in Malaysia and Scotland"

[24] Wilcox, David,

Conflict between land and planning legislation over land use and development control:

The National Land Code and the Town and Country Planning Act 1976[25] govern and define the parameters of the land use and development control systems of Peninsular Malaysia. Leong[26] asserts that the two separate sets of legislation on land use and development control administered by separate bodies have given rise to conflict between the authorities administering them. Conflicts, which arise from the two systems of control, have also weakened the utility of land and planning legislation as a means of land use control. This is because it can lead to the occurrence of breaches of condition and under utilization of land. One notable example of the occurrence of conflict between these two legislations is the case of Yow Chuan Plaza in Kuala Lumpur[27]. In this case an approval for a development plan was made in contravention of the zoning plan for that area. The land in question was zoned as a residential area under the Planning Act but the approval given by the land office under section 130 of the National Land Code was for commercial use. Another instance in which a landowner can be drawn into an area of possible conflict with planning law concerns his right to apply to the appropriate land office under the National Land Code for conversion of the existing land use to another land use which may be contrary to the development plan. This is because the National Land Code does not require that the Land Office must take planning law into consideration when an application for approval of a conversion is submitted.

Conflict in land development initiatives by FELDA:

The Federal Land and Development Authority (FELDA) was established 46 years ago under the Land Development Act, 1956. It served as one of the federal government's tools to help eradicate poverty and restructure the community. The main role of FELDA was to open up and manage the new agricultural land schemes. The settlers were selected among the hardcore poor in the rural areas who had no other lands to work on. Under the schemes, each settler family is given 8-10 acres of land; two acres for planting fruit trees and one quarter of an acre for constructing a house. At the end of the repayment of the consolidated annual charge, which includes the premium on land, development costs, survey fees etc., each settler will be issued with a land title. This normally takes about 15 years.

Up to the end of 1995, some 536,694 hectares of agricultural areas had been developed nationwide under schemes. Altogether, there are 309 land schemes accommodating over

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[25] Act 171 of 1976

[26] Leong, Hoon Wah, "Ideology and Conflict in the Systems of Control of Use and Development of Land in Malaysia and Scotland", Master of Science dissertation at p.

[27] Ibrahim, Kamilia, *Land Use and Development Control in the Federal Territory of Kuala Lumpur,* (1984*),* Master of Law dissertation, University of Malaya at p.

100,000 families. This federal government land development machinery managed to stem modern settlers who contributed significantly to the plantation sector of the economy. These effective methods of land reform have become the model for other under-developed countries to emulate. Now, this FELDA land that constitute the nation's largest land bank, has become a focal point for development. This is because the scarcity of land in the prime zones eventually forces the development to spill over to the surrounding areas. These developments encircle some of the FELDA scheme and pressure inevitably builds up to bring the FELDA land forward to meet the need for commercial and industrial development. Thus, after 41 years of its implementation, many state governments have decided to redevelop FELDA land for commercial and industrial purposes and this defeats the original land development reform initiated by the federal government.

Conflict in the law and policy with regard to Malay Reservation legislations

The Malay Reservation legislation was initially introduced by the British colonial government to Malaya in the early 20th century as a means to preserve land ownership within the hands of the Malay peasant landowners who were economically weaker than other races. Many land law scholars were of the opinion that these legislation was a form of "Restriction on dealings" to Malay reservation landowners. However, they were also of the opinion that this restriction or control on dealings may also be viewed as a form of "prohibition against disposition by the state" or as a means of "controlled land alienation". Thus Malay reservation legislation can also be viewed as a form of planning land use by the State Authorities which limits ownership and dealings of land declared as "Malay reservation" to Malays. The special feature or the uniqueness of Malay Reservation as compared to other land legislation is that this protection/policy is embodied in the Federal Constitution itself i.e. via Article 89, the supreme law of the land, despite "land" being a state matter. However, each state at the same time has its own Malay Reservation legislation or Malay Reservation Enactment. It is also observed that "Malay Reservation" is exclusively a state matter and the Federal Parliament cannot legislate on this matter on the uniformity ground under Article 76(4) of the Constitution. The study will therefore look at conflict from the perspective of the relationship of Article 89 of the Federal constitution with that of the allocation of powers with regard to Malay Reservation under the State List and the consequent relationship between the National Land Code, a federal law and the various Malay Reservation legislative enactments; the definitional problem arising from Article 89 and from the power to revoke, alter the Malay reservation land.

Conflict in the environmental law

Unlike land, the Federal Constitution does not directly address "environment" and "environmental related matters" even though matters pertaining to them are contained in Schedule 9 of the Constitution. In fact, the term "environment" or "environment related matters" are nowhere defined by the Constitution. Matters related to the environment however, appear in all the five list of Schedule 9 of the Constitution. This means that both the Federal government and also the State government has jurisdiction to legislate on environmental related matters. Hence, the study of conflict in the environmental law in Chapter 7, based upon this constitutional set up, include identifying "environment" and "environment related matters" under Schedule 9 and the conflict arising from this delineation of power between the Federal government and State government. This study will also be illustrated by an analysis of the landmark Bakun's case.

It was suggested above that conflict is inherent and inevitable in the Malaysian land law under a federal system government. The Federal Constitution, the supreme law of the land, delineates power with regard to land and land related matters between the Federal government and the various State governments, allowing for diversity and also uniformity of its law and policy. Hence conflict arises out of this division of powers.

Conclusion

The land law under a federal structure allows for diversity and also uniformity of law and policy. The heavy central bias present in the federal set-up has created imbalances between the federal and state government. Moreover, inherent in the federal structure is the idea of conflict – whether conflict in its political nature or in its constitutional dimension – as the whole idea of federalism is to provide a platform for a resolution of inter-state conflict, as well as federal-state conflict. This is the dynamism of federalism. However, the amount or seriousness of conflict can be mitigated by various mechanisms of co-operative federalism and can be avoided by political allegiance. Thus, political dimension will subdue the constitutional significance of conflict. But Malaysia has been fortunate in that these tensions have rarely erupted in open conflict. Most of the conflict has been resolved, ended and settled mainly by consultation, consent and via political means. Examples of conflict resolved via by political means were amongst others the Endau-Rompin's dispute and Felda. However, recent changes in the political scene whereby five states, namely Kedah, Kelantan, Perak, Penang and Selangor are governed by the opposition party, will lead to the resurgence of conflict. This is because political resolutions are not legally binding: they are not final and therefore bind in personam but not in rem. However, legal resolution will give rise to the right in rem. In other words, as long as there is political allegiance between the federal and the many state governments, then conflict can be suspended by political means. However, the moment political allegiance breaks down, conflict will assume its constitutional dimension and resurface. This is what the writer intends to achieve namely to show conflict in its constitutional dimension.